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BEFORE THE
SURFACE TRANSPORTATION BOARD



STB DOCKET NO. AB-290 (Sub- No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION -
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND

ENTERED
Office of Proceedings
MAY - 4 2010
Part of
Public Record

COMMENTS / REPLY TO PETITION TO STAY AND
PETITION TO REOPEN APRIL 5, 2010 DECISION

1. I, Lois Lowe, herewith provide my Comments to Norfolk Southern Railway Company's Petitions for Exemption, and my Reply to James Riffin's ("**Riffin**") Petition for Stay and Petition to Reopen.

BACKGROUND INFORMATION

2. On April 5, 2010, the Board in the above entitled proceeding, served a decision granting Norfolk Southern Railway Company ("**NSR**") authority to abandon its operating rights on that portion of the Cockeysville Industrial Track ("**CIT**") that lies between Mileposts UU 1.0 and UU 15.44, and exempted the proceeding from the Offer of Financial Assistance ("**OFA**") procedures. The Board's Order stated the exemptions would become effective on May 5, 2010. The Order further stated that petitions to stay must be filed by April 20, 2010, and petitions to reopen must be filed by April 30, 2010.

COMMENTS - DENIAL OF DUE PROCESS

3. "Due process requires, at a minimum, ... there must be **notice and an opportunity to respond.**" *Talley v. Talley*, 317 Md. 428, 434-435 (1989). (Emphasis added.) In accord: *Blanton v. Equitable Bank Nat'l Ass'n*, 61 Md. App. 158, 166 (1985); *Miranda v. Southern Pacific Transp. Co.* 710 F.2d 516, 522-23 (1983); *Zkravkovich v. Bell Atl-Tricon Leasing*, 323 Md.200, 209-210 (1991); *Roadway Exp. Inc. v. Piper*, 447 U.S.765, 767, 100 S.Ct. 2455, 2464 (1980).

4. On January 5, 2010, Zandra Rudo ("**Rudo**"), Carl Delmont ("**Delmont**") and I filed Notices to Participate as a Party of Record and personally signed the Notices to Participate. NSR moved to strike the notices, arguing that the notices were "from persons unidentified and unidentifiable." NSR January 14, 2010 Motion to Strike, p. 4. In a decision served on March 22, 2010, the STB struck Rudo's, Delmont's and my Notices to Participate, stating:

"Of those individuals purportedly seeking to participate, only Riffin and now Eric Strohmeier have submitted sufficient information to be listed as parties of record. Accordingly, NSR's motion to strike the participation Notice is granted as to all of the named individuals except for Riffin." Op. at 3.

5. Following the Board's March 22, 2010 Decision, on March 23, 2010, I spoke with Jo Dettmer, the STB's Deputy Director of Proceedings. During my telephone conversation, I offered to provide the STB with a photocopy of my Maryland Driver's License, to establish my identity. Mr. Dettmer explicitly stated that that was not necessary, for in his opinion, I was 'identified.' Not willing to trust Mr. Dettmer's oral assurance, I filed a Motion for Protective Order with the STB along with a photocopy of my driver's license (under seal). As it turned out, it was good I ignored Mr.Dettmer's assurance and sent a photocopy of my driver's license to the STB, since the STB did not acknowledge that I was

'identified,' and that I became a party, until March 26, 2010, the date the photocopy of my driver's license arrived at the STB.

6. On page 5 of its March 22, 2010 Decision, the STB made the following statements:

"In the interest of compiling a full and complete record, the Comments, as amended and supplemented, will be accepted into the record **solely on behalf of Riffin**. However, Riffin is advised that he has had a full and fair opportunity to respond to the NSR petition for exemption. ... **Accordingly, any further submissions by Riffin to supplement the record will be looked upon with disfavor by the Board.**" (Emphasis added.)

7. It was not until the Board served its April 5, 2010 Decision that Rudo, Delmont and I were informed that we had the right to participate as parties of record. Unfortunately, our right to participate was purely illusory, since the right to participate was granted on p.2 of the STB's April 5, 2010 Decision, then rendered moot on p. 8 of the April 5 Decision, where the STB granted NSR's request to exempt the proceeding from the OFA procedures.

8. This failure to permit Rudo, Delmont and I to actually participate meaningfully, and to submit evidence to the STB regarding our interest in preserving the CIT for our freight rail needs, and the interest in freight rail service of six other shippers, denied us our "opportunity to respond," *Roadway Express, op. cit.*, and thus denied us our Due Process Right to participate in the proceeding. The STB is fully aware that I am the Executive Secretary of the Cockeysville Rail Line Shippers Coalition, since I submitted letters from Cockeysville Shippers to the STB on February 22, 2006, in AB 290 (Sub No. 237X), *Petition for Exemption - Norfolk Southern Railway Company - Cockeysville Line, Baltimore City and Countny, Maryland*. [A copy of my February 22, 2006 cover letter is appended hereto for the STB's convenience.] Since the STB and NSR **were both fully aware of who I am**, it was an **egregious violation** of my Due Process Rights to strike my Notice of

Intent to Participate as a Party of Record, and to abrogate my Due Process Right to submit evidence of shipper interest in the CIT.

9. In November, 2009, in anticipation of NSR's Petition to abandon the CIT, shippers who had executed letters of interest / opposition to loss of freight rail service in 2006, executed new letters of interest / opposition to loss of freight rail service. Since I am the Executive Secretary of the Cockeysville Rail Line Shippers Coalition, I, rather than Riffin, am the appropriate party to submit to the STB under seal, copies of letters from shippers expressing a desire for rail service in Cockeysville. This is the reason why Riffin did not include these shipper's letters in his Protective Order. Since in its March 22, 2010 decision, the STB expressly denied me the right to participate as a party, and since the STB expressly stated that it would look upon any additional filings by Riffin "with disfavor," Riffin complied with the STB's 'order' by not filing any additional material, and I waited until the STB granted me authority to participate. But at the moment the STB granted me authority to participate, it also summarily took away my right to participate, by rendering its decision exempting the proceeding from the OFA procedures.

10. Since the STB gave no weight to the shippers' letters previously filed by Riffin, due to the lack of verification, the shippers have reexecuted **verified** letters opposing loss of rail service on the CIT, indicating their desire for rail service, and further indicating the commodities they would ship and the estimated number of rail cars per year they would ship. The total number of rail cars these eight shippers would ship, 260, is 70 more than the 190 cars NSR stated that it shipped **at a profit**. See AB 290 Sub No. 237X, op. cit.

11. In a separate filing, I have filed a Supplement to my Motion for Protective Order, which Supplement includes, under seal,

eight verified letters from shippers who desire freight rail service on the CIT, and who object to the loss of freight rail service on the CIT.

**COMMENTS - THE STB LACKS JURISDICTION
TO ASCERTAIN THE SCOPE OF THE PROPOSED ABANDONMENT**

12. On page 6 of its Petition for Exemption, NSR states:

"The Line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44."

13. The statements "just north of Wyman Park Drive" and "south of the bridge at railroad milepost UU 15.44" are very imprecise. NSR and the MTA equivocate: In its Petition, NSR said the Line ends at MP 15.44, even though it also said in its footnote 11, that the Final System Plan only conveyed to MP 15.4. The MTA said in its April 26, 2010 Reply to Riffin's Petition for Stay, that the Line ends at MP 15.4, which is what the Final System Plan states. The MTA further stated in its April 26 Reply at p.4:

"Neither that deed nor any other evidence offered by Riffin specifies that 'Bridge No. 16' means 'the bridge at MP 15.96.' "

14. The U.S. Court of Appeals, District of Columbia Circuit, recently stated in *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009), that where the Board's authority was challenged and an interpretation of the Final System Plan or the Special Court's conveyance order under 45 U.S.C. 719(e)(2) was required, the Board lacked jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.

15. In this proceeding, NSR has failed to identify precisely where the Line it proposes to abandon is located, and has failed to

precisely indicate the scope of the conveyance to Conrail pursuant to the Final System Plan. NSR states in its Petition that it seeks to abandon to a point "south of the bridge at railroad milepost UU-15.44." Petition at 6. How far south of the "bridge at milepost UU - 15.44" is not specified. NSR does not indicate where the "Bridge at milepost UU 15.44" is located.

16. On page 15 of the *Consolidated Rail Corp. v. STB* decision, *Id.*, the court stated:

"The FSP [Final System Plan] designated for transfer to Conrail certain 'rail lines,' FSP at 261 (JA 842), which '[u]nless otherwise specified ... include[] all rail properties ... **connected with**, controlling or in any way pertaining to or **used or usable** by the designee in connection with the rail line designated including ... connecting spur and storage tracks.' *Id.* at 241 (JA 965)." (Emphasis added.)

17. The railroad bridge over Beaver Dam Run was washed out by Hurricane Agnes on June 23, 1972. The railroad bridge over the Codorus Creek in Pennsylvania, a hundred feet or so north of Hanover Junction (about ½ mile south of Seven Valleys, PA), was also washed out. The Penn Central Transportation Company elected not to repair or replace these two bridges. Instead, in September, 1972, it filed to abandon that portion of the Northern Central Line that lies between Cockeyville, MD and Hyde, PA (about 5 miles north of Hanover Junction). Consequently, service between Cockeyville and Hanover Junction was no longer possible after June 23, 1972, since this segment was no longer 'connected' to the National Rail System.¹

¹ The State of Pennsylvania objected to the abandonment of that portion of the Northern Central Line that lies between Hyde, PA and the Maryland / Pennsylvania line. After protracted litigation, the State of Pennsylvania bought this segment of the Line, then replaced the Codorus Creek railroad bridge that had been washed out by Hurricane Agnes, thereby preserving this segment for continued rail service. The State of Maryland filed no objection to the abandonment of the segment that lies between Cockeyville, MD and the Maryland / Pennsylvania line. The Interstate Commerce Commission never acted on the Maryland abandonment petition. This segment was ultimately abandoned by the Final System Plan, when it was not included in Final System Plan, due to this segment not being "connected with, ... or used or usable by the designee in connection with the rail line designated."

18. The FSP, on p. 241, noted that the FSP was transferring to Conrail those line segments "**connected with, ... or used or usable** by the designee" Since that segment of the Northern Central line that was located between Beaver Dam Run in Cockeysville, MD, and Codorus Creek at Hanover Junction, in Pennsylvania, was no longer "**connected with, or used or usable** by the designee in connection with the rail line designated," I argue that the FSP **did not convey** this portion of the Northern Central Line to Conrail, and that therefore, **the STB has no jurisdiction over this segment.**

19. NSR, in its Petition for Exemption, stipulated that it sought to abandon to Milepost UU 15.44, which appears to be at Western Run. I base this conclusion on the following:

A. Mr. Riffin has admitted into the record Mr. Robert Williams' Exhibit C-5, which depicts that portion of the Line that traverses the stations of Texas (south of old MP 14) and Ashland (south of old MP 16). This Exhibit states that the "York Turnpike" undergrade bridge is at old MP 14.85. This Exhibit further notes an undergrade bridge at old MP 15.05, where the Veneer Spur is depicted as being connected to the CIT. There is a 6-foot diameter culvert at this location. Another undergrade bridge is depicted at old MP 15.16. This MP 15.16 bridge is 0.31 miles from the York Road bridge, or about 1,636 feet. [15.16 minus 14.85 = 0.31 miles = 1636.8 feet.] A land survey by Thompson and Associates, shows the distance from the center of York Road to the center of Beaver Dam Run, along the center line of the right-of-way, is 1,529 feet. From this I would conclude that the undergrade bridge depicted at MP 15.16 is the bridge that crossed Beaver Dam Run.

B. Scaling an ADC map from York Road to the center of Western Run along the center line of the right-of-way, gives the distance from York Road to Western Run as 3,149 feet. This is

close to the distance as computed from Exhibit C-5: 3,115 feet. [15.44 minus 14.85 = 0.59 miles = 3,115.2 feet.] From this I would conclude that the bridge depicted at MP 15.44 is the bridge over Western Run.

20. Appended as Exhibit B to the MTA's April 26, 2010 Reply is a photocopy of p. 505 of Volume II (Part III) of the Final System Plan, dated July 26, 1975. The heading states: "The following Out of Service and Intermittently Served Lines are not Designated for Transfer to Consolidated Rail Corp." For Line 145, the following notes appear:

"[Termini:] Hyde, Pa (Milepost 54.6) to Cockeysville, Md (Milepost 15.4). [Date Last Used:] June 23, 1972 [Reason Out of Service and Comments:] Damaged by 'Agnes.' The Cockeysville Industrial Park lies south of Milepost 15.4 and will continue to receive service."

21. The Final System Plan said it was transferring to Conrail only to MP 15.4. Where MP 15.4 is actually located, is unknown at this time. The "Out of Service" notes state the date last used for Milepost 15.4, was September 23, 1972). "Damaged by 'Agnes.' "

22. The bridge over Western Run, which is about 1,500 feet north of Beaver Dam Run, was not damaged by Hurricane Agnes. Today it is still intact, and with the addition of a new set of railroad ties, would be fully functional. Western Run is just a few hundred feet south of the former Ashland Station. The Cockeysville Station was located a few hundred feet north of York Road, or about 1,400 feet from the Beaver Dam Run bridge that Agnes washed out. Had the 'Out of Service' note been referring to Western Run, it would have said to Ashland, at MP 16, rather than to Cockeysville, at MP 15.4. Since the Western Run bridge was not damaged by Agnes, while the Beaver Dam Run bridge was totally obliterated by Agnes, the "Damaged by 'Agnes' " note was more likely referring to the Beaver Dam Run bridge.

23. Since the purpose of the Final System Plan was to retain those portions of line that were, as of July 26, 1975, "**connected with, or used or usable** by the designee in connection with the rail line designated," and since that portion of the CIT that was located north of Beaver Dam Run was incapable of being served by rail on July 26, 1975 (due to the obliteration of the Beaver Dam Run bridge), it is more probable that the intent was to convey to Conrail only to the south side of Beaver Dam Run, rather than to the south side of Western Run.

24. A physical inspection of the right-of-way on the south side of Beaver Dam Run would reveal a large mound of dirt on top of the mainline track, about 400 feet south of the south Beaver Dam Run bridge abutment. This mound of dirt would constitute a very effective end-of-track 'bumper.' Consequently, it is more likely than not, that the south side of this mound of dirt was the maximum northerly extent of the CIT that was "**connected with, or used or usable** by the designee in connection with the rail line designated."

25. I herewith **challenge** the STB's jurisdiction to "consider [NSR's] petition," since NSR's Petition "falls within the 'original and exclusive jurisdiction' of the United States District Court for the District of Columbia as successor to the Special Court 'to interpret ... [an order] entered by [the Special Court].'" *Consolidated Rail Corp. v. STB, op. cit.* at 19.

26. I argue that the extent of the conveyance by the FSP to Conrail must be determined prior to the STB granting NSR any abandonment authority on the CIT. The **precise** location of the 'cut line' on the right-of-way must be determined, so that reversionary property interests may be precisely determined. This can only be done by the successor to the Special Court.

27. I adopt by reference herein, as if fully stated herein, all of the comments, allegations and legal arguments put forth by Mr. Riffin in his Petition to Stay and Petition to Reopen, except where they conflict with what I have argued, *supra*.

28. I certify under the penalties of perjury that the above is true and correct to the best of my knowledge, information and belief.

Executed on May 3, 2010.

Respectfully submitted,

Lois Lowe

Lois Lowe
Ste 200 50 Scott Adam Road
Cockeysville, MD 21030
(443) 226-5077

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2010, a copy of the foregoing Comments, etc., was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Zandra Rudo, James Riffin and Carl Delmont and was served via e-mail upon Eric Strohmeyer.

Lois Lowe

Lois Lowe

COCKEYSVILLE RAIL LINE SHIPPERS COALITION

13 Beaver Run Lane
Cockeysville, MD 21030

(443) 226-5077

February 22, 2006

Vernon Williams, Secretary
Surface Transportation Board
1925 K Street NW 20423-0001

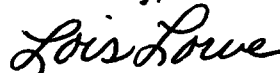
RE: STB Docket No. AB 290-237X
Petition for Exemption; Norfolk Southern Railway Company;
Cockeysville Line, Baltimore City and County, Maryland

Dear Secretary Williams:

Attached are five letters, along with ten copies of each letter, from prospective shippers whose businesses are located on or near the Cockeysville rail line, which rail line is the subject of Norfolk Southern Railway Company's Petition for Exemption, Abandonment of Freight Operating Rights and of Rail Freight Service. The authors of the letters object to the loss of rail freight service on the Cockeysville rail line, support Mr. James Riffin's offer to purchase the rail line from Norfolk Southern, and indicate that the prospective shippers would utilize the rail line to ship products via rail, providing shipment via rail was less expensive than shipment of their products via truck.

On February 3, 2006, two of the letters (Mark Downs, Packard Fence) were filed with the Board. Since neither of these two letters have appeared on the Board's web site for this case, copies of the letters previously filed with the Board, are being filed a second time.

Sincerely,



Lois Lowe
Executive Secretary